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IN THE

Supreme Court of the United States

October Term, 1942.

No. 7928. 200

ANTON MAHNICH,

Petitioner,

v.

THE SOUTHERN STEAMSHIP COMPANY,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This is a suit in personam in admiralty under the general maritime law for injuries sustained due to the use of a defective rope which petitioner alleges as unseaworthiness of the vessel. The petitioner's claim, as his counsel concedes, is not one for redress under the Jones Act because that action has been barred by lapse of time.

The facts are substantially as set forth in petitioner's brief, but for clarity the case arises from the following circumstances: the petitioner was a seaman and was engaged in washing down the paint on the bridge while the vessel was at sea. He was doing this work on a staging which had been rigged up at the order of the mate. One of the ropes holding the staging broke causing the staging to fall and the petitioner to fall to the deck. The rope was defective. It was selected for use by the mate after he had inspected it. The rope appeared to him to be in good condition. There was an abundant supply of other rope on board which was not defective and which could have been used for the same purpose.

ARGUMENT.

The respondent contends that this practically identical case has been before your Honorable Court in *Plamals v. SS Pinar Del Rio*, 277 U. S. 151 (1928), and that the question was there decided in favor of the respondent. The Circuit Court of Appeals for the Third Circuit in its decision by Judge Goodrich states that "the Pinar Del Rio decision seems to be squarely on the point and it seems to be our duty to follow it."

The *Pinar Del Rio* case involved an injury to a seaman while he was engaged on working on a paint job. The rope broke, the injured man was hurt when he fell to the deck. There too the accident occurred when the mate selected bad rope when an abundant supply of good rope was on board. Your Honorable Court in that case stated that "the record did not support the suggestion that the Pinar Del Rio was unseaworthy. The mate selected a bad rope when good ones were available" (p. 155). The petitioner claims that this was only dictum by Mr. Justice McReynolds who wrote the opinion of the court, but as the Circuit Court of Appeals in its opinion stated "we think it cannot be so lightly dismissed." Examination of the petition for writ of certiorari and the brief filed in your Honorable Court on behalf of the injured seaman, the libellant, discloses Point V therein was that "under general maritime law, independent of the Jones Act, libellant was entitled to recover for respondent's failure to supply and keep in order proper appliances including the proper bos'n's chain, proper gantline, properly rigged for the seaworthiness of the vessel in this respect" and cited two cases, *Julia Fowler*,

49 Fed. 277, and *Johnson & Co. v. Johansen*, 86 Fed. 886, cert. den. 170 U. S. 706. In the respondent's brief in reply to Point V, the respondent stated that the question was not one of unseaworthiness and furthermore pointed out that the *Julia Fowler* and the *Johnson & Co. v. Johansen* cases had been overruled by *The Osceola*, 189 U. S. 159. Hence there can be no doubt that the very question raised here was before your Honorable Court in the *Pinar Del Rio* case.

Petitioner states on page 6 of his brief in the present case that the decision of the Circuit Court of Appeals is in direct conflict with the trend of decisions under the maritime law and cites certain cases. Examination of those cases do not sustain petitioner's contention. We shall merely call attention to *The Noddleburn*, 28 Fed. 855, and *The Portland*, 213 Fed. 699, and the same holds true of the other cases cited.

In *The Noddleburn*, 28 Fed. 855, the seaman was injured when a crane line broke, causing him to fall. Prior to the accident the mate had been informed that the crane line was insufficient and had ordered it repaired, but his order was countermanded by the master. The crane line in question was part of the rigging of the foremast backstay and the after foremast shroud.

This case involved not a choice of supplies to be used in performing some work to be done, but in the master permitting the crane line which was a part of the ship's rigging to remain in an unsecure condition.

The discussion by the court in *The Osceola* of this case would indicate that it did not consider that liability in *The Noddleburn* was founded upon a mere negligent act.

In *The Portland*, 213 Fed. 699, the suit was by a stevedore, not a seaman. He was injured by reason of the fact

that the rope slings which had been made up on the vessel from bales of rope under the direction of the mate whose duty it was to inspect the slings and to determine their strength and fitness for use. The stevedores were furnished a larger number of slings than they actually required for use and to that extent had a limited choice as to the ones which would be used.

That case is not controlling here as there was not the relation of master and servant as between the owner and stevedore, and the general rule is that the former would be liable to the latter, a business invitee, for any negligence of any type that caused his injury.

We admit that there is a duty upon the shipowner at the commencement of the voyage to make the vessel seaworthy and that was done in the case of the vessel here involved, namely, *The Wichita Falls.* The trial judge held: "That the Wichita Falls was not unseaworthy." 45 F. Supp. 839, 840. This finding was not altered by the Circuit Court of Appeals.

The basis of a seaman's claim for indemnity under the maritime law in a case like this is the unseaworthiness of the vessel. The burden is upon him to prove it. He does not meet this burden merely by showing that a supply, namely rope, furnished him was defective where it also appears that such supply was selected by a ship's officer or other seaman from a large quantity not shown to be in any way defective or unsuitable.

The direct cause of the petitioner's injury was the use of defective rope by the mate. The fact that he used this particular rope when he could have used other rope that was not defective was the result of the exercise of

his judgment in the ordinary management and operation of the ship.

The mere operating negligence even of one in authority does not create responsibility. *Chelentis v. Luckenbach SS Co.*, 247 U. S. 372, 384.

The respondent contends that its duty was fulfilled when at the commencement of the voyage the vessel was supplied with adequate rope, concerning which there is no dispute.

The respondent further is of the opinion that there is and should be a difference between what may be considered as part of the ship's rigging and gear and, as in the present case, merely rope which is considered part of ship's supplies.

The petitioner further contends that, if *Plamals v. SS Pinar Del Rio* was law, it was overruled by the case of the *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424 (1939). In that case the sole question was whether assumption of risk is a defense in a suit by a seaman under the Jones Act to recover for injuries resulting from his use while on duty of a defective appliance instead of a known safe method of doing his work. The Circuit Court of Appeals held that "the opinion of Mr. Justice Stone is directed to this point. The decision was one under the Jones Act and as we read the act we do not even find a dictum to support the position of the libellant here." There was no mention in any of the briefs filed before your Honorable Court in that case of the *Plamals v. SS Pinar Del Rio* case, and it is fair to assume that it played no part in your decision and was not even considered, nor do we conceive of any reason why it should have been since the two cases involved distinct and separate problems.

It is our understanding that *Plamals v. SS Pinar Del Rio* is still the law. It is a sound decision and it should not be overruled.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for The Southern Steamship Company.